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In The

Supreme Court of the United States

October Term, 1997

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, LOS ANGELES BRANCH; MULTICULTURAL COLLABORATIVE; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP; SOUTHERN CALIFORNIA AMERICANS FOR DEMOCRATIC ACTION; DAVID E. ALLEN; FRANK L. BERRY; HESTER M. WATKINS; TALT COLDIRON; DOLORES C. STEPHENS; ISAAC R. ELNECAVE; DENISE M. M. ROBB; MICHAEL A. FEINSTEIN; JAMES E. STURM; ALLEN RUBINSTEIN; ARNOLD ARBISO; CHARLES L. LINDNER,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE; CONNY B. MCCORMICK, REGISTRAR OF VOTERS FOR LOS ANGELES COUNTY; MICHAEL D. ANTONOVICH; YVONNE BRAITHWAITE BURKE; DEANE DANA; GLORIA MOLINA; ZEV YAROSLAVSKY, MEMBERS OF THE BOARD OF SUPERVISORS OF LOS ANGELES COUNTY; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower court rulings, upholding a $50,000 voter pamphlet fee which effectively operates as a ballot access restriction, conflict with this Court's rulings in *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974), invalidating candidate filing fee barriers as violative of the Equal Protection Clause.

2. Whether a $50,000 voter pamphlet fee, which excludes voters and candidates from an integral part of Los Angeles County's judicial election process, violates the Equal Protection Clause.

3. Whether a $50,000 voter pamphlet fee, which prevents voters from receiving information on the qualifications of judicial candidates unable to pay the fee, violates the First Amendment.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 131 F.3d 1317 (9th Cir. 1997), and is reprinted in the Appendix to this petition at App. 1-17. The opinion of the District Court for the Central District of California is unpublished and is reprinted at App. 18-35.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on December 16, 1997 and denied Plaintiffs-Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc on February 13, 1998. App. 36-37. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . .

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Relevant provisions of the California Elections Code §§ 13300, 13307-13313 are included in the Appendix at App. 38-45.

STATEMENT OF THE CASE

A coalition of civil rights organizations, individual voters, and a judicial candidate brought this action in May 1996 to challenge a $50,000 fee charged to judicial candidates for the inclusion of a 200-word statement in a voter pamphlet published and distributed by Los Angeles County to every registered voter in the county.[1] The lead Petitioners include the Los Angeles Branch of the NAACP and the Southern Christian Leadership Conference of Greater Los Angeles, whose members regularly exercise their right to vote for judges in Los Angeles County. The Petitioners allege that the voter pamphlet fee violates their constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and under the First Amendment to the Constitution. The Respondents are the Secretary of State of California, the Registrar of Voters for Los Angeles County, and the Board of Supervisors of Los Angeles County. The Petitioners seek declaratory relief invalidating as unconstitutional the section of the California Elections Code under which Los Angeles County imposes this prohibitively high voter pamphlet fee and a

[1] The Petitioners also challenged the constitutionality of the campaign finance system for judicial elections in Los Angeles County. This petition does not seek this Court's review of the lower court rulings on those claims.

court order enjoining the Respondents from charging this fee to judicial candidates for inclusion in the voter pamphlet.

A. Statement Of Facts

The California Elections Code §§ 13300, 13307-13313 requires the Registrar of Voters of each county in the state to print and distribute an Official Sample Ballot and Voter Information Pamphlet to every registered voter of the respective county. App. 38-45. The statute further requires that the sample ballots "be identical to the official ballots, except as otherwise provided by law." California Elections Code § 13300, App. 38. The statute allows counties to charge candidates fees for the costs of including their 200-word statements in the voter pamphlet. California Elections Code § 13307(c), App. 40. It also allows counties to require advance payment by the candidates. *Id.* Candidates who are indigent are not required to pay the costs of such statements in advance but may be billed their pro rata share after the election. California Elections Code § 13309, App. 42. Thus, the law provides no exemption or reduction for indigent candidates.

Respondent Los Angeles County Board of Supervisors chooses to charge judicial candidates the cost of including their statement in the voter pamphlet, resulting in a fee of approximately $50,000. Petitioners' Amended Complaint, R.No.3 at 33 ("Am. Compl.")[2] Voters in Los

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[2] The full record in the District Court will be referred to as "R.".

Angeles County rely on the statements in the voter pamphlet to learn about the qualifications of judicial candidates. *Id.* at 10, 16, 18-19, 21, 23, 26, 32, 35. Thus, candidates with statements in the voter pamphlet enjoy enhanced, county-sponsored exposure to voters before they cast the official ballot on election day. The $50,000 fee prevents candidates unable to pay the fee from informing voters of their qualifications through this county-sponsored election document. Candidates who cannot afford to pay for a statement in the voter pamphlet lose 90 percent of the time. *Id.* at 34.

At oral argument before the Ninth Circuit panel, the Court asked counsel for the Los Angeles County respondents what an indigent candidate was to do upon receiving a $50,000 bill from the County following an election. Counsel responded that such a candidate would be free to declare bankruptcy.[3]

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[3] Judge B. Lynn Winmill, United States District Judge for the District of Idaho sitting by designation, asked: "One of the things we don't have here is some understanding of how this actually works out. What you're telling me then is every indigent candidate will, in fact, ultimately have to pay and that this is not an exception but just simply a deferral, an installment payment plan."

Halvor Melom, counsel for Los Angeles County respondents: "To the extent an indigent can be forced to pay, yes, an indigent can walk down to bankruptcy court and say 'no thank you.' "

Judge Winmill: "Okay, so then you're putting a candidate with the choice of going into bankruptcy or . . . choosing not to participate."

Petitioners' transcription of audiotaped copy of August 4, 1997 oral argument before the U.S. Court of Appeals for the Ninth Circuit.

Petitioners include voters and organizations which represent voters who are low income and who cannot afford to help the judicial candidate of their choice pay the $50,000 voter pamphlet fee. Am. Compl., R.No.3 at 2-6, 8-29, 32-37.

Petitioners further include a judicial candidate, Charles L. Lindner, an attorney who has practiced for 25 years and who ran for a superior court seat in Los Angeles County in 1996. *Id.* at 7, 29-30. Petitioner Lindner is not indigent, but he could also not afford to pay the $50,000 fee for the inclusion of a 200-word statement in the voter pamphlet. *Id.* at 29. Petitioner Lindner's statement, therefore, did not appear in the voter pamphlet. Petitioner Lindner's opponent could afford the fee and Los Angeles County printed his statement in the pamphlet, which it distributed to every registered voter in the county. *Id.* at 30. The Los Angeles County Bar Association rated Petitioner Lindner as "qualified" and rated his opponent as "unqualified." *Id.* at 29. Petitioner Lindner lost the election.

One-third of the superior court and one-third of the municipal court seats in Los Angeles County are up for election every two years. *Id.* at 35. Candidates and their families provide nearly half of all campaign money – the largest single source of funds – in superior court contests, with more than eighty percent of such contributions coming in amounts of $50,000 or more. *Id.* at 31-32. Lawyers and law firms serve as the second largest source of funds for judicial candidates. *Id.* at 32. Some successful candidates end their campaigns in substantial debt and are forced to continue to raise money as sitting judges, including raising money from practicing lawyers. *Id.* In

1994, successful candidates in superior court run-offs reported campaign debts ranging from $47,000 to $121,000. *Id.* The $50,000 voter pamphlet fee serves as a significant contribution to the campaign debts of judicial candidates in Los Angeles County.

B. The Lower Court Decisions

(1) The District Court Ruling

Respondents filed motions to dismiss the Petitioners' complaint on the grounds of standing and failure to state a claim upon which relief may be granted. On August 12, 1996, the District Court granted the Respondents' motions to dismiss and on August 13, 1996, the District Court entered a judgment to that effect.

The District Court found that the Petitioners did not suffer an injury in fact as a result of the voter pamphlet fee and it, therefore, ruled that they did not have standing to challenge the fee system. The District Court also found that Petitioners did not have a cause of action, relying on *Kaplan v. County of Los Angeles*, 894 F.2d 1076 (9th Cir. 1990), *cert. denied*, 496 U.S. 907 (1990) (upholding voter pamphlet fee system in constitutional challenge brought by sitting judge and judicial candidate who could afford to pay the fee).

(2) The Ninth Circuit Ruling

The Petitioners appealed the District Court's ruling to the United States Court of Appeals for the Ninth

Circuit. On December 16, 1997, the Ninth Circuit issued an opinion affirming the District Court's ruling. The Ninth Circuit assumed the Petitioners had standing but found that the Petitioners failed to state a claim upon which relief could be granted.

Relying on *Kaplan*, the Ninth Circuit ruled that the voter pamphlet fee did not violate the Petitioners' equal protection and First Amendment rights. It stated that the fee "does not affect a candidate's right to appear on the ballot, participate in an election, or disseminate information to the public." App. 16. It further ruled that *Kaplan*, which involved a challenge brought by a judicial candidate who could afford the fee, controlled the Petitioners-voters' constitutional claims.

REASONS FOR GRANTING THE WRIT

Los Angeles County publishes and distributes an Official Sample Ballot and Voter Information Pamphlet to all registered voters in the county prior to their exposure to the official ballot on election day. The voter pamphlet serves as a crucial and often the only means by which voters are able to learn about the qualifications of judicial candidates running for municipal and superior court seats in the county. Am. Compl., R.No.3 at 10, 16, 18-19, 21, 23, 26, 32, 35. Candidates and their voter-supporters who are unable to purchase a statement in the voter pamphlet face an almost insurmountable disadvantage, losing 90 percent of the time. *Id.* at 34. The voter pamphlet fee presents a serious barrier to candidates and voters

who are unable to pay the fee. The fee system also undermines the integrity of Los Angeles County's court system by making a candidate's personal wealth or access to wealth a determinant factor in whether he or she becomes a judge.

The facts alleged here, taken as true for the purpose of deciding Respondents' motions to dismiss, demonstrate that the $50,000 voter pamphlet fee in Los Angeles County effectively operates as a ballot access restriction, in conflict with this Court's rulings in *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974) (striking down candidate filing fee barriers as unconstitutional on equal protection grounds). Further, the fee requirement excludes voters and candidates who are unable to pay the fee from "an integral part" of the judicial election process, in violation of their equal protection rights. And, the fee requirement prevents voters from receiving information on the qualifications of judicial candidates unable to pay the fee, in violation of voters' First Amendment rights.

The lower court rulings upholding this $50,000 fee barrier to voter and candidate participation in Los Angeles County's judicial election process should not stand unreviewed by this Court.

I. THE RULING BELOW CONFLICTS WITH THIS COURT'S RULINGS IN *BULLOCK V. CARTER* AND *LUBIN V. PANISH*

In *Bullock*, this Court invalidated, on equal protection grounds, a series of filing fees that the state of Texas

required primary candidates to pay to their political parties in order to get on the primary ballot. The fees ranged from $150 to $8900. This Court found that "the very size of the fees imposed under the Texas system [gave] it a patently exclusionary character." *Bullock*, 405 U.S. at 143. This Court further ruled that "[t]he effect of this exclusionary mechanism on voters is neither incidental nor remote." *Id.* at 144. "We would ignore reality," this Court wrote, "were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id. See also Lubin* (striking down California's $701.60 filing fee for county supervisor election, ruling that filing fees do not "test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office": "[O]ur tradition has been one of hospitality toward all candidates without regard to their economic status." *Lubin*, 415 U.S. at 717-718); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (striking down a $1.50 poll tax in Virginia state elections).

In *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555 (1996), this Court recently reaffirmed its landmark holdings in *Bullock*, *Lubin*, and *Harper*. "The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *M.L.B.*, 117 S.Ct. at 568 (citing *Bullock*, *Lubin*, and *Harper*).

The lower court rulings in this case conflict with this Court's holdings in *Bullock* and *Lubin*. The Ninth Circuit's finding that the $50,000 voter pamphlet fee "does not affect a candidate's right to appear on the ballot, participate in an election, or disseminate information to the public," App. 16, directly contradicts the facts alleged by

Petitioners and assumed as true at this stage of the proceedings. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Los Angeles County distributes an Official Sample Ballot and Voter Information Pamphlet to all 3.6 million registered voters in the county prior to their exposure to the ballot on election day. The California Elections Code requires that the sample ballots "be identical to the official ballots, except as otherwise provided by law." California Elections Code § 13300, App. 38. Candidates who can afford the county's $50,000 voter pamphlet fee appear on the sample ballot with a statement about their qualifications. Candidates who are unable to pay the fee appear on the sample ballot without any statement. Thus, candidates with statements in the voter pamphlet enjoy enhanced, county-sponsored exposure to voters before they cast the official ballot on election day.

The voter pamphlet fee in Los Angeles County effectively operates as a ballot access restriction. As with Petitioner Lindner[4], ninety percent of all judicial candidates who are unable to pay the $50,000 fee and whose

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[4] Petitioner Lindner's status as a candidate who is not indigent is not relevant to his claim that the voter pamphlet fee violates his equal protection rights. Petitioner Lindner is still unable to pay the $50,000 fee. Proof of indigency is not required in this Court's rulings striking down wealth barriers to voter and candidate participation in the political process. *See Bullock* 405 U.S. at 135 (candidates "unable to pay" the filing fees); *Harper* 383 U.S. at 668 (voters "unable to pay" the poll tax). *See also M.L.B.*, 117 S.Ct. at 568 ("The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.")

statements are thereby excluded from the voter pamphlet lose the election.

Further, the Ninth Circuit's finding that the voter pamphlet fee does not violate *voters'* constitutional rights is in conflict with this Court's holdings in *Bullock* and *Lubin*. The voters in this case cannot afford to help a judicial candidate of their choice pay the $50,000 fee. Am. Compl., R.No.3 at 2-6, 8-29, 32-37. In addition, the voters in this case rely on the county's pamphlet as a crucial and often the only means of information about the qualifications of judicial candidates. *Id.* at 10, 16, 18-19, 21, 23, 26, 32, 35. The voter pamphlet fee effectively prevents the Petitioners-voters from learning about the qualifications of all judicial candidates. The fee requirement "falls with unequal weight on voters, as well as candidates, according to their economic status." *Bullock*, 405 U.S. at 144.

The fee requirement is even more egregious in its application to indigent candidates.[5] Under the California

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[5] Petitioners' constitutional challenge to the voter pamphlet fee includes a challenge to the fee as applied to indigent candidates. The Ninth Circuit panel's opinion mischaracterizes Petitioners' complaint by claiming that the voter pamphlet fee as applied to indigent candidates "is not challenged in this suit . . . " App. 8. It is. Petitioners state throughout their complaint that they are "low income," "less affluent," "nonwealthy," and "lack personal wealth and access to wealth." Am. Compl., R.No.3. They allege that they cannot afford to contribute large sums of money to a judicial candidate of their choice, money which could be used to help pay the $50,000 voter pamphlet fee. *Id.* at 2-6, 8-29, 32-37. Taken as true with all reasonable inferences to be made in favor of the Petitioners, *Scheuer*, 416 U.S. at 236, these factual allegations necessarily include the Petitioners' inability to learn about and

Elections Code, candidates who are indigent have no method through which they can effectively bypass this requirement. They may be included in the voter pamphlet without advance payment, but the county may still charge them the $50,000 fee after the election. California Elections Code § 13309, App. 42. Such candidates, as Respondent acknowledges, would be required to declare personal bankruptcy to escape paying the charge. *See supra*, n.3.

Indigent candidates for judicial seats in Los Angeles County should not have to declare bankruptcy in order to be included in an official voter pamphlet distributed by the county to all registered voters. By allowing counties to charge indigent candidates the $50,000 fee after the election, the voter pamphlet statute effectively erases any real exemption to the fee requirement. This provision of the statute violates the equal protection rights of indigent candidates and their voter supporters, like Petitioners here. *See Bullock* and *Lubin*.

Under this Court's precedents, Petitioners' allegations clearly state a claim that Los Angeles County's $50,000 voter pamphlet fee violates Petitioners' equal protection rights. The rulings below are in direct conflict with this Court's rulings in *Bullock* and *Lubin* and should be reviewed by this Court.

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to elect indigent candidates. Further, the violation of the voters' rights to learn of and support indigent candidates is independent of whether a candidate plaintiff is himself or herself indigent.

II. BY EXCLUDING CANDIDATES AND VOTERS FROM A "PART OF THE MACHINERY FOR CHOOSING OFFICIALS," LOS ANGELES COUNTY'S VOTER PAMPHLET FEE VIOLATES THE EQUAL PROTECTION CLAUSE

In *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), this Court reaffirmed its holding in *Terry v. Adams*, 345 U.S. 461 (1953) that "any 'part of the machinery for choosing officials' becomes subject to the Constitution's restraints." *Morse* at 218, quoting *Terry* at 481 (1953) and *Smith v. Allwright*, 321 U.S. 649, 664 (1944). In *Morse*, this Court found state action in the Virginia Republican Party's $45 filing fee for delegates to its party nominating convention. The Court held that Section 5 of the Voting Rights Act of 1965, " *'like the constitutional provisions it is designed to implement,* applies to entities having any power over any aspect of the electoral process . . . ' " *Morse* at 220, quoting *United States v. Sheffield Bd. Of Comm'rs*, 435 U.S. 110, 118 (1978) (emphasis added). Exclusion from "an 'integral part' " of the election process, the *Morse* Court reiterated, "does not merely curtail [plaintiffs'] voting power, but abridges their right to vote itself." *Id.* at 207, quoting *United States v. Classic*, 313 U.S. 299, 318 (1941).

Los Angeles County's voter pamphlet is "an integral part" of the county's judicial election process. As stated earlier, Los Angeles County publishes and distributes the voter pamphlet with a sample ballot to all registered voters in the county prior to their exposure to the official ballot on election day. The pamphlet serves as a crucial and often the only means by which voters are able to

learn about the qualifications of judicial candidates running for municipal and superior court seats in the county. Am. Compl., R.No.3 at 10, 16, 18-19, 21, 23, 26, 32, 35. Candidates and their voter-supporters who are unable to purchase a statement in the voter pamphlet lose 90 percent of the time. *Id.* at 34.

The state has created a step in the election process which, for all practical purposes, prevents the election of excluded candidates. Those candidates unable to pay and their voter supporters are excluded from any meaningful participation in the election, just as surely as the voters in *Terry* and the convention participants in *Morse* were effectively excluded from a meaningful vote. Indeed, unlike in *Morse* and the white primary cases, the presence of state action is not even in question. In this case, a governmental entity, not a private political party, is directly excluding candidates and their voter-supporters from "an integral part" of the election process. As in *Morse*, this exclusion "does not merely curtail [Petitioners'] voting power, but abridges their right to vote itself." *Morse* at 207.

The $50,000 fee requirement excludes Petitioners from "a part of the machinery for choosing" judges in Los Angeles County, in violation of Petitioners' equal protection rights. The rulings below failed to address this separate equal protection challenge to the voter pamphlet fee. Los Angeles County's exclusion of the Petitioners from the voter pamphlet is a serious infringement on their right to vote. The Ninth Circuit's ruling that this exclusion states no cause of action under the Fourteenth Amendment should be reviewed by this Court.

III. LOS ANGELES COUNTY'S VOTER PAMPHLET FEE VIOLATES VOTERS' FIRST AMENDMENT RIGHTS TO HEAR CAMPAIGN SPEECH

In Los Angeles County's judicial elections, open and robust discussion on the qualifications of candidates depends heavily on the official voter pamphlet printed and distributed by the county to every registered voter. Am. Compl., R.No.3 at 10, 16, 18-19, 21, 23, 26, 32, 35. Candidates who cannot afford to pay for a statement in the voter pamphlet lose 90 percent of the time. *Id.* at 34. These facts, which were not presented in *Kaplan*, demonstrate that a judicial candidate's exclusion from the voter pamphlet has a severe impact on the rights of voters to hear campaign speech.

The First Amendment affords its fullest protection to Petitioners' rights to open and robust discussion of issues in election campaigns. *Burson v. Freeman*, 504 U.S. 191 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971)). Such protection is critical to the state's interest "in fostering an informed electorate." *Eu*, 489 U.S. at 228, citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983). In *Eu*, this Court held that a ban on party endorsements of candidates in primaries directly affects First Amendment protected speech. This Court stated that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Eu*, 489 U.S. at 223. This Court thus found that the ban "hamstrings voters seeking to inform themselves about the candidates and the campaign issues." *Id.*

This Court has further held that the First Amendment's protection of the right to free speech covers both the speaker and the listener. "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases." *Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc. et al.*, 425 U.S. 748, 756 (1975) (citations omitted). *See also Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972) (referring to a First Amendment right to "receive information and ideas" and stating that freedom of speech " 'necessarily protects the right to receive,' " quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)).

The voter pamphlet fee denies the Petitioners-voters their First Amendment "right to receive" information on the qualifications of judicial candidates who are unable to pay the fee. The Ninth Circuit ruling states that "voter plaintiffs have no right to receive all of the information they would like in the Sample Ballot." App. 12. Yet, if voters are able to receive information – through a state and county-sponsored election document – on the qualifications of candidates who can afford to pay the $50,000 fee, voters must also be able to receive such information in that same document from those who cannot afford to pay the fee. This is especially true when voters are the intended primary beneficiaries of the election document, the very purpose of which is to facilitate the state and county's interest in "fostering an informed electorate." Where the state and the county establish a crucial and often the only effective means of communication by candidates to the electorate, it must ensure that such means

of communication be open to all, regardless of economic status.

The Ninth Circuit ruling cites its earlier opinion in *Kaplan* on the point that "content neutral restrictions [in a limited public forum] must be shown to . . . 'leave open ample alternative channels of communication.' " App. 11, citing *Kaplan*, 894 F.2d at 1080 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The operative word here is "ample." Los Angeles County distributes the voter pamphlet to all 3.6 million registered voters in the county. Judicial candidates who can afford to purchase a statement in the voter pamphlet are able, therefore, through a state and county-sponsored document, to communicate information about their qualifications to every registered voter in their judicial district, as a municipal court candidate, or in the entire county, as a superior court candidate. Los Angeles County does not leave open any "ample alternative" for candidates who are unable to pay the $50,000 fee. There is no "ample alternative" to a candidate statement which appears with the county's sample ballot – printed in a way which is identical to the official ballot – and which the county distributes to every registered voter. This lack of an ample alternative is further highlighted by the fact that candidates who cannot afford to purchase a statement in the voter pamphlet lose 90 percent of the time.

The lower court ruling also fails to address the impact of the voter pamphlet fee on the Petitioners' First Amendment right "to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Laws which deny groups "the fruits of their association – the political impact – run afoul of the First Amendment no less than

ones which preclude association itself." L. Tribe, *American Constitutional Law* at 1103. Petitioners have alleged that they cannot afford to pay the $50,000 voter pamphlet fee for candidates of their choice. In excluding Petitioners from "an integral part" of the judicial election process, *Morse* at 207, quoting *Classic* at 318, this fee requirement denies Petitioners their rights "to cast their votes effectively." *See also Anderson v. Celebrezze*, 460 U.S. at 787-788 (rights of voters to cast their votes effectively); *Erum v. Cayetano*, 881 F.2d 689, 692 (9th Cir. 1989) ("rights of qualified voters to cast their votes effectively"); *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989) (Maryland's $150 write-in fee to include write-in candidates on the list of official candidates and to publish the votes received violated voters' rights to cast their votes effectively).

The voter pamphlet fee is a direct infringement on Petitioners' First Amendment rights as voters. This Court should review the lower court rulings upholding that infringement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: May 13, 1998

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Los Angeles Branch; MULTICULTURAL COLLABORATIVE; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP; SOUTHERN CALIFORNIA AMERICANS FOR DEMOCRATIC ACTION; DAVID E. ALLEN; FRANK L. BERRY; HESTER M. WATKINS; TALT COLDIRON; DOLORES C. STEPHENS; ISAAC R. ELNECAVE; DENISE M.M. ROBB; MICHAEL A. FEINSTEIN; JAMES E. STURM; ALLEN RUBINSTEIN; ARNOLD ARBISO; CHARLES L. LINDNER,

Plaintiffs-Appellants,

v.

BILL JONES, Secretary of State of California; CONNY B. MCCORMICK, Registrar of Voters for Los Angeles County; MICHAEL D. ANTONOVICH; YVONNE BRAITHWAITE BURKE; DEANE DANA; GLORIA MOLINA; ZEV YAROSLAVSKY, Members of the Board of Supervisors of Los Angeles County; BOARD OF SUPERVISORS OF LOS ANGELES COUNTY,

Defendants-Appellees.

No. 96-56455

D.C. No. CV-96-03469-DT

OPINION

Appeal from the United States District Court
for the Central District of California
Dickran Tevrizian, District Judge, Presiding

Argued and Submitted
August 4, 1997—Pasadena, California

Filed December 16, 1997

Before: Cynthia Holcomb Hall and Thomas G. Nelson,
Circuit Judges, and B. Lynn Winmill, District Judge.*

Opinion by Judge Hall

SUMMARY

Government Law/Elections

The court of appeals affirmed a judgment of the district court. The court held that a state's primary campaign finance scheme does not violate the constitutional rights of voters or candidates because it lacks public funding and uses a cost-reimbursement system for ballot statements.

Under California law, county registrars must distribute sample ballots for primary elections to registered voters. Each candidate is entitled to submit a statement for publication in the sample ballot, and must reimburse the county for the actual cost if the board of supervisors requires it. Only if the candidate is indigent may the costs be billed after the election. Since 1965, appellee Los Angeles County Board of Supervisors has required candidates to reimburse the County for the costs of printing their ballot statements.

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*The Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

Appellant Charles Lindner was a candidate for judicial office. In a federal action against the Board and others for declaratory and injunctive relief, Lindner and various voters and voter associations challenged California's campaign finance system. They claimed that they were neither wealthy nor indigent, and that the County maintained a "wealth primary" that requires the expenditure of substantial funds to conduct a "meaningful" campaign. This process, they contended, effectively excludes candidates who are neither wealthy nor indigent from mounting such a campaign, and prevents voters of such financial means from hearing all candidates' messages, and from contributing effectively to a candidate's campaign.

Lindner and the other plaintiffs specifically cited the cost-reimbursement system as an example of government action that contributes to the "wealth primary." In their view, the system violated their rights under the First Amendment and the Equal Protection Clause. They asserted that for every candidate to have the opportunity to run a "meaningful" campaign, the County had to include candidate statements in the sample ballot for free, and allot funds to candidates sufficient to finance such campaigns.

The district court dismissed the claims. Lindner and the other plaintiffs appealed.

[1] When analyzing an equal protection claim, heightened scrutiny is applied only when a restriction burdens a suspect class or a fundamental right. Without heightened scrutiny, a distinction need be only rationally related to a legitimate governmental purpose.

[2] Wealth is not a suspect category. The plaintiffs' claims were not entitled to heightened scrutiny on that basis. **[3]** Race is a suspect class. However, to the extent that the plaintiffs alleged that the cost recovery system had a disparate impact on racial minority groups, the Equal Protection Clause

is not implicated by classifications with disparate racial impact in the absence of discriminatory intent. The plaintiffs did not allege discriminatory intent. Thus, the "wealth primary" did not burden a suspect class.

[4] A forum created by the government to allow a limited class of speakers to address a particular class of topics, such as a voters' pamphlet, is a limited public forum. Content-neutral restrictions must be shown to serve a significant state interest in a narrowly tailored fashion, and leave open ample alternative channels of communication.

[5] The cost recovery scheme at issue was designed to recover the actual costs of printing a candidate's statement. It does not affect a candidate's ability to get his or her name on the ballot; nor does it affect the other means available to candidates to disseminate their views to the public. It does not violate the First Amendment for a public entity to collect charges that fairly reflect costs incurred in connection with an activity involving expression.

[6] First Amendment protection is afforded to the communication, to its source, and to its recipients. **[7]** While both the speaker and the listener have the right to assert First Amendment rights, no precedent exists for the proposition that the listener's rights are greater than those of the speaker. As recipients of campaign speech, the voter plaintiffs had no greater rights than the candidates to have candidates publish their statements in the sample ballot.

[8] Similarly, the plaintiffs' status as voters in an election did not extend their First Amendment rights to include a more general right to receive publicly funded campaign speech. The First Amendment does not guarantee access to all the information a voter would like to receive. Voters' rights include the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters to cast their votes effectively. Elections do not have a general expressive

function. The voter plaintiffs had no fundamental right to have candidates' campaigns publicly funded.

[9] There was no viewpoint distinction. Either all or none of the participating candidates have to reimburse the county for the costs of printing their statements. Moreover, all candidates must fund their campaigns themselves. Nor did the plaintiffs allege that the requirement to reimburse costs and the lack of public funding were intended to or had the effect of discriminating against a particular viewpoint. The "wealth primary" does not burden any fundamental First Amendment rights.

[10] There was no state action putting wealthy voters in a better position to contribute to campaigns than non-wealthy voters. Societal differences in income or the high cost of running a judicial campaign could not be attributed to the State. **[11]** There was no claim that the voter plaintiffs were denied their right to cast votes in any part of the election process. The ability to contribute financially to a campaign prior to voting does not equate with the right to cast a vote. **[12]** Nor could the plaintiffs cite any case establishing a fundamental right of voters to contribute to a successful campaign. The plaintiffs' inability to help a candidate win an election did not prevent those candidates from appearing on the ballot.

[13] While the Equal Protection Clause confers on voters a right to participate in elections on an equal basis with other qualified voters, that right does not protect any political group from electoral defeat. The Equal Protection Clause does protect the equal weight of each person's vote, voters' rights to cast their votes without being charged a poll tax, and the right of voters to associate in groups to advance political beliefs.

[14] The plaintiffs did not allege that they were denied their right to vote, or that their votes were diluted, but rather that their ability to influence others prior to voting was diminished by their lack of wealth. There is no authority for the right of

each voter to have equal access to the campaigning process. The voters did not show any fundamental right that was burdened by California's judicial election process.

[15] The cost recovery system does not affect a candidate's right to appear on the ballot, participate in an election, or disseminate information to the public. The system provides one method for candidates to express their qualifications to the electorate and share the cost. The "wealth primary" did not burden any of Lindner's fundamental rights.

[16] The lack of public funding and the implementation of the cost reimbursement system were rationally related to the legitimate purpose of having candidates finance their own campaigns. Refusing to publicly fund an activity such as judicial campaigning is a rational and permissible choice of state allocation of funds. Similarly, requiring candidates to reimburse the printing costs of their statements is permissible. **[17]** Neither candidates nor voters have a right to judicial elections that are financially viable for all candidates seeking election. Without heightened scrutiny, the statutory system passed muster.

COUNSEL

Abigail Turner and John C. Bonifaz, National Voting Rights Institute, Boston, Massachusetts, for the plaintiffs-appellants.

Thomas A. Blake, Deputy Attorney General, San Francisco, California, for defendant-appellee Jones.

Halvor S. Melom, Principal Deputy County Counsel, Los Angeles, California, for the defendants-appellees of Los Angeles County.

OPINION

HALL, Circuit Judge:

Plaintiffs appeal from the district court's 12(b)(6) dismissal of their complaint seeking declaratory and injunctive relief. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

This court reviews a motion to dismiss de novo. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995).

Because plaintiffs allege no cognizable constitutional injury, we AFFIRM.

I

Plaintiff Charles Lindner is a former judicial candidate. The remaining plaintiffs are voters and associations of voters who claim that they lack wealth and access to wealth.

Defendants are Bill Jones, the Secretary of State of California; the Los Angeles County Registrar of Voters ("Registrar"); members of the Los Angeles County Board of Supervisors ("Board"); and the Board itself.

Plaintiffs challenge California's campaign finance system for judicial elections. They claim that Los Angeles County ("County") has in place a "wealth primary," which requires the expenditure of a substantial amount of money to run a "meaningful" campaign. This process effectively excludes candidates who are neither wealthy nor indigent from running a "meaningful" campaign and it prevents voters who are neither wealthy nor indigent from hearing all candidates' messages and from contributing effectively to a candidate's "meaningful" campaign. As a concrete example of a government action that contributes to this "wealth primary," plaintiffs point to the requirement that candidates reimburse the

costs of printing candidate statements in the Official Sample Ballot and Voter Information booklet ("Sample Ballot").

By statute, the Registrar must distribute a Sample Ballot to each registered voter in the County. Each candidate is permitted to submit for publication in the Sample Ballot a 200-word statement describing his or her qualifications and education. Cal. Elec. Code § 13307.

The statute gives the Board discretion each election cycle to determine whether the candidates who choose to include statements must reimburse the County for the actual costs of including their statements. Cal. Elec. Code § 13307. The statute authorizes advance payment by the candidates of the estimated costs of printing the statements. The County cannot profit from the payments; the amount the candidates paid will be adjusted after the election if necessary; and the funds do not finance the costs of the election. If a candidate is indigent, she is not required to pay the costs in advance, but she may be billed her pro rata share after the election.[1] Cal. Elec. Code § 13309. The Board has made candidates reimburse the County for the costs of printing their statements in every election cycle since 1965.

Plaintiffs seek declaratory and injunctive relief, claiming that the "wealth primary" system violates their rights under the First Amendment and the Equal Protection Clause. They claim that for every candidate to have the opportunity to run a meaningful campaign, the County must include the candidate's statement in the Sample Ballot for free and allot an

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[1]The portion of the statute authorizing the County to require indigent candidates to reimburse printing costs after the election is not challenged in this suit, as plaintiffs specifically categorize themselves as neither indigent nor wealthy. We therefore issue no opinion as to the validity of the cost reimbursement system as it applies to indigent candidates.

amount of money to the candidate that would allow him to run a meaningful campaign.[2]

The district court, in two separate orders, dismissed plaintiffs' causes of action against defendants. The court dismissed the claims against defendant Jones because the plaintiffs had not alleged specific facts that Jones had violated their rights.[3] The court dismissed the claims against the remaining defendants because the plaintiffs failed to state an injury in fact and therefore lack standing.[4]

The district court did not specifically address the state law claims, and appellants have not raised the state law claims on appeal. These claims are therefore waived.

II

The components of the "wealth primary" attributable to defendants are an absence of public funding for judicial campaigns and the use of a cost reimbursement system for printing candidate statements in the Sample Ballot.

Plaintiffs here claim that the "wealth primary" violates Equal Protection. They contend that the "wealth primary" distinguishes among candidates based on financial resources because meaningful campaigns require large expenditures, and it distinguishes among voters based on financial resources because those with fewer resources are unable to financially

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[2]At oral argument, plaintiffs' counsel suggested that the amount of money necessary to run a meaningful campaign in each election could be determined on a case by case basis.

[3]We perceive plaintiffs' claims more broadly than the district court, including a challenge to the statewide election system, rather than only a challenge to the cost reimbursement system. Therefore, we do not dismiss the claims against defendant Jones separately.

[4]For the purposes of this appeal, we assume standing and reach the merits. *See Clow v. U.S. Dep't. of Housing and Urban Dev.*, 948 F.2d 614, 616 n.2 (9th Cir. 1991).

support a candidate, and a successful candidacy requires financial support.

[1] When analyzing an Equal Protection claim, heightened scrutiny is applied only when a restriction burdens a suspect class or a fundamental right. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Without heightened scrutiny, a distinction need be only rationally related to a legitimate purpose. *E.g., Clements v. Fashing*, 457 U.S. 957, 963 (1982).

A

[2] Wealth is not a suspect category in Equal Protection jurisprudence. *Harris v. McRae*, 448 U.S. 297, 322-23 (1980); *United States v. Barajas-Guillen*, 632 F.2d 749, 753 (9th Cir. 1980). Plaintiffs' claims are not entitled to heightened scrutiny on this basis.

[3] Race is a suspect class. However, to the extent that plaintiffs allege that the cost recovery system has a disparate impact on racial minority groups, the Equal Protection Clause is not implicated by classifications with disparate racial impact in the absence of discriminatory intent. *Washington v. Davis*, 426 U.S. 229 (1976). Plaintiffs do not allege discriminatory intent. Thus, the "wealth primary" does not burden a suspect class.

B

Plaintiffs' primary argument is that heightened scrutiny should be applied because the cost recovery system burdens their fundamental rights to have access to every candidate's viewpoints; to elect candidates of their choice; and, in the case of plaintiff Lindner, to run successfully for public office.

1. *First Amendment Rights*

Plaintiffs contend that the statutory scheme for running judicial elections burdens their fundamental First Amendment

rights, including their right of access to candidates' viewpoints.

[4] A forum created by the government to allow a limited class of speakers to address a particular class of topics, such as the voters' pamphlet here, is a limited public forum. *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990). As such, content neutral restrictions must be shown "to serve a significant state interest in a narrowly tailored fashion and leave open ample alternative channels of communication." *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

[5] The *Kaplan* court examined the interests on each side of California's cost recovery scheme for judicial elections. The cost recovery scheme at issue here is designed to recover the actual costs of printing the candidate's statement. It does not affect a candidate's ability to get his or her name on the ballot; nor does it affect the other means available to candidates to disseminate their views to the public. This court has held that "it does not violate the First Amendment for a public entity to collect charges that fairly reflect costs incurred by the municipality in connection with an activity involving expression." *Kaplan*, 894 F.2d at 1081 (citations omitted). *Kaplan* clearly disposes of Lindner's claim to a First Amendment right to have his statement published for free.

Voter plaintiffs attempt to distinguish *Kaplan* by arguing that the voters are the intended users of the Sample Ballot and that they are deprived of information regarding a candidate's qualifications when that candidate cannot afford to pay. They claim that while *Kaplan* addressed the candidate's rights as a speaker in this limited public forum, it did not address the voters' rights as listeners. Their rights as listeners, they contend, outweigh the rights of the speaker. There is no support for this proposition.

[6] The Supreme Court has found that First Amendment protection is afforded "to the communication, to its source

and its recipients both." *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756 (1976). In *Virginia Pharmacy*, the Court found that where First Amendment protection attached to the flow of drug price information, those rights inured both to advertisers seeking to distribute the information and to plaintiffs, who were recipients of the drug price advertising. The Court concluded that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising." *Id.* at 757.

[7] While both the speaker and the listener have the right to assert First Amendment rights, no precedent exists for the proposition that the listener's rights are greater than those of the speaker.[5] Thus, voter plaintiffs, as recipients of campaign speech, have no greater rights than the candidates to have candidates publish statements in the Sample Ballot. Therefore, *Kaplan* controls voter plaintiffs' claims as well; voter plaintiffs have no right to receive all of the information they would like in the Sample Ballot.

[8] Similarly, plaintiffs' status as voters in an election does not extend their First Amendment rights to include a more general right to receive publicly funded campaign speech. The First Amendment simply does not guarantee access to all of the information a voter would like to receive. Voters' rights include the "right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (holding state's early filing deadline, which excluded

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[5]In fact, in *Virginia Pharmacy*, the Court found the listener's rights to derive from the existence of the speaker's rights. 425 U.S. at 756 ("Freedom of speech presupposes a willing speaker. . . . [W]here a speaker exists, as is the case here, the protection afforded is to the communication . . . ."); *accord Dow Jones and Co. v. Simon*, 842 F.2d 603, 608 (2d Cir. 1988) (finding that the "right to receive speech does not enlarge the rights" accorded to the speaker because listeners' rights are "entirely derivative" of speaker's rights).

independent candidate from ballot, unconstitutional). Elections do not have a general expressive function. *See Burdick v. Takushi*, 504 U.S. 428 (1992). Plaintiffs here ask this panel to extend the First Amendment's guarantees beyond those articulated in any previous decision. We refuse to do so. Voter plaintiffs have no fundamental right to have candidates' campaigns publicly funded.

[9] Voter plaintiffs also argue that there is an issue of viewpoint discrimination because voters have a right to receive the viewpoints of all candidates. This argument is meritless. The challenged requirement requires either all or none of the participating candidates to reimburse the County for the costs of printing the statement. Moreover, all candidates must fund their campaigns themselves. There is no viewpoint distinction. Nor have the plaintiffs alleged that the requirement to reimburse costs and the lack of public funding are intended to or have the effect of discriminating against a particular viewpoint. The "wealth primary" does not burden any fundamental First Amendment rights.

2. *Right to Elect Candidates of Choice*

Plaintiffs claim that voters have a fundamental right to contribute effectively to a candidate's campaign. They rely on *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), for this proposition.

[10] In *Smith*, the Court found that the exclusion of African Americans from a Democratic primary was unconstitutional. *Smith* is different in two crucial respects from the case at hand. First, the *Smith* Court found that the primary system was, through Texas' statutory scheme, an actual part of the election process; because African-American voters were denied participation in the primaries, they were denied their right to vote. Plaintiffs attempt to stretch this logic to fit the facts here. They argue that a candidate must spend money as a necessary part of the election process; because voter plain-

tiffs lack wealth, they cannot contribute financially to this necessary part of a candidate's campaign. However, in *Smith*, Texas' statutory scheme made the primaries a part of the election process, and African Americans were unequivocally denied access to that part of the process. Here, there is no state action putting wealthy voters in a better position to contribute to campaigns than non-wealthy voters. We refuse to attribute societal differences in income or the high cost of running a judicial campaign to the State.

[11] Second, the right being denied in *Smith* was the right of African-American voters to cast votes in the primary, and the Court relied on plaintiffs' constitutional right to vote. 321 U.S. at 661-62. There is simply no claim here that voter plaintiffs are denied their right to cast votes in any part of the election process. We do not equate the ability to contribute financially to a campaign prior to voting with the right to cast a vote.[6] *Smith* is inapposite.

In *Terry*, the Court found that the combined actions of a private association and the Democratic Party denied African Americans the right to vote in primaries. The Court relied on cases, including *Smith*, where African-American voters were denied access to voting for candidates in primaries. Like *Smith*, *Terry* vindicated African-American voters' rights to cast votes in primary elections. The inability to influence other peoples' votes through campaign contributions is not equivalent to the inability to cast one's own vote. Neither *Smith* nor *Terry* confers a right on voters to have equal influence in the election process.

[12] Nor can plaintiffs cite any case establishing a fundamental right of voters to contribute to a successful campaign. Plaintiffs' inability to help a candidate win an election does not prevent those candidates from appearing on the ballot. *See*

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[6]Moreover, plaintiffs are not precluded from contributing to candidates' campaigns by other means, such as volunteering their time.

Lubin v. Panish, 415 U.S. 709 (1974). In *Lubin*, the Court struck down a candidate filing fee requirement that could not be waived, even in cases of indigence. In that case, the right to vote was burdened because of the barriers to being placed on the ballot; thus voters did not have the option of casting their vote for an otherwise qualified candidate. The Court clarified that, "[t]his does not mean every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for *a place on the ballot* may not constitutionally be measured solely in dollars." *Id.* at 716 (emphasis added). There is no contention here that either voters' wealth or a candidate's wealth affects their place on the ballot.

[13] While the Equal Protection Clause confers on voters a right "to participate in elections on an equal basis with other qualified voters," that right does "not protect any 'political group,' however defined, from electoral defeat." *Mobile v. Bolden*, 446 U.S. 55, 77 (1980). The Equal Protection Clause does protect the equal weight of each person's vote, as in redistricting cases. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). The Clause also protects voters' rights to cast their votes without being charged a poll tax. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 664, 666 (1966). It also protects the right of voters to associate in groups to advance political beliefs. *See Anderson*, 460 U.S. at 787.

[14] None of these voters' rights cases help plaintiffs here. Plaintiffs do not allege that they are denied their right to vote or that their votes are diluted, but rather that their ability to influence others prior to voting is diminished by their lack of wealth. There is no authority for the Equal Protection claim plaintiffs make here—namely, the right of each voter to have equal access to the campaigning process. The voters have not shown any fundamental right that is burdened by California's judicial election process.

3. *Right to Run for Office*

[15] Plaintiff Lindner cannot show that the election process violates any of his fundamental rights as a candidate. Candidates do not have a fundamental right to run for public office. *E.g., Clements*, 457 U.S. at 963 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). The cost recovery system does not affect a candidate's right to appear on the ballot, participate in an election, or disseminate information to the public. *See Bullock*, 405 U.S. at 143 (holding high filing fees to appear in primaries erected barrier to appearing on ballot and were unconstitutional). Here, as in *Kaplan*, the system provides "one method for candidates to express their qualifications to the electorate, if they choose to do so and share the cost." 894 F.2d at 1082. The challenged "wealth primary" does not burden any of Lindner's fundamental rights.

C

Because the "wealth primary" does not burden a suspect class nor a fundamental right, we analyze the "wealth primary" using the rational basis test.

[16] The state actions at issue here include the lack of public funding and the implementation of the cost reimbursement system. Both of these actions are rationally related to the legitimate purpose of having candidates finance their own campaigns. Refusing to publicly fund an activity, such as judicial campaigning, is a rational and permissible choice of state allocation of funds. *See Harris*, 448 U.S. at 316 (finding no state obligation to remove financial barriers that are not of its own creation). Similarly, requiring candidates to reimburse the printing costs of their candidate statements is permissible as well. *See M.L.B. v. S.L.J.*, 117 S. Ct. 555, 567-69 (1996) (Government's "need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement."). The candidates are only required to reimburse for the cost of printing

their actual statement if they choose to submit such a statement. This is one of many ways for candidates to campaign.

[17] The Supreme Court has also expressed its views regarding the position plaintiffs take in this case. In *Timmons v. Twin Cities Area New Party*, the Supreme Court, holding Minnesota's anti-fusion law valid, reasoned that "[m]any features of our political system—e.g., . . .the high costs of campaigning—make it difficult for third parties to succeed in American politics. . . . But the Constitution does not require States to permit fusion any more that it requires them to move to proportional-representation elections or public financing of campaigns." 117 S. Ct. 1364, 1371 (1997) (citations omitted). The Supreme Court has rejected the notion that all candidates are entitled to equal footing in the campaigning process, and we reject it as well. Neither candidates nor voters have a right to judicial elections that are financially viable for all candidates seeking election. Without heightened scrutiny, the statutory system clearly passes muster.

III

The plaintiffs fail to state a claim upon which relief can be granted. This court's *Kaplan* decision, as well as Supreme Court precedent, make clear that the lack of public campaign financing and the cost reimbursement system do not offend either the First or Fourteenth Amendment with regard to voters or judicial candidates. The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NAACP, Los Angeles Branch, Plaintiffs, vs. BILL JONES, Secretary of State of California; BOARD OF SUPERVISORS OF LOS ANGELES COUNTY, et al., Defendants.	CASE NO. CV 96-3469 DT (RNBx) ORDER GRANTING DEFENDANTS CONNY B. MCCORMACK, LOS ANGELES BOARD OF SUPERVISORS, MICHAEL D. ANTONOVICH, YVONNE DEANE DANA, GLORIA MOLINA AND ZEV YAROSLAVSKY'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) WITH PREJUDICE AND WITHOUT LEAVE TO AMEND

Background

This action is brought by a group of plaintiffs (collectively "Plaintiffs") against defendants Bill Jones, Secretary of State of California; Conny B. McCormack, Registrar of Voters for Los Angeles County; Los Angeles County Board of Supervisors; Members of Los Angeles County Board of Supervisors Michael D. Antonovich, Yvonne Brathwaite Burke, Deane Dana, Gloria Molina, and Zev Yaroslavsky (collectively "Defendants") for violation of Civil Rights-Voting Rights. Plaintiffs challenge

the campaign finance system in judicial elections in Los Angeles County, California because they claim it allegedly discriminates against them on the basis of their lack of wealth and access to wealth. *See* Plaintiffs' Amended Complaint at p. 2. Applicant Esther M. Lofton ("Applicant") seeks to intervene as a party-plaintiff.

It is alleged that the electorial [sic] process which is the subject matter of this action allegedly excludes and discourages voters and candidates who lack vast personal wealth or access to wealth from full enjoyment of their constitutional right to vote. *Id.*

Plaintiff National Association for the Advancement of Colored People ("NAACP") includes more then 4,500 members, almost all of whom are registered voters. A large part of the NAACP members are low or modest income voters and without resources to make large campaign contributions. Thus, the NAACP advocates against election practices where wealth is a requirement for meaningful participation. *Id.* at 8-9.

Plaintiff Multiculture Collaborative ("MCC") is an advocate and catalyst for achieving equitable treatment, intergroup cooperation and democracy in the diverse communities of Los Angeles. *Id.* at 10-11. The MCC, its member organizations, and its program participants who are without wealth are alleged to be effectively excluded from the critical wealth primary process in judicial elections in Los Angeles County. *Id.* at 12.

Plaintiff Southern Christian Leadership Conference of Greater Los Angeles ("SCLC") advocates for justice for all persons regardless of economic status and teaches and encourages full political participation to bring about a

just community. Members of the SCLC regularly exercise their right to vote for judges but allege they are harmed because they lack wealth and access to wealth. *Id.* at 13-14.

Plaintiff California Public Interest Research Group ("CALPIRG") has since 1984 played a leadership role in registering students nationwide to vote. It is alleged that CALPIRG's members ability to choose among a broad group of candidates is hindered by the necessity for candidates to raise large sums to deliver their message. Consequently, CALPIRG's ability to carry out its goals of greater and more meaningful voter participation are harmed. *Id.* at 14-15.

Plaintiff Southern California Americans for Democratic Action ("SCADA")[1] promotes reforms in the political process to enable and encourage all citizens to participate to the maximum ' extent possible in the democratic process. Since SCADA's members are without wealth or access to wealth, they maintain that they are unable to identify a judicial candidate with whose views they agree on contemporary issues. *Id.* at 15-16.

Each of the remaining plaintiffs, David E. Allen, Frank L. Berry, Hester M. Watkins, Talt Coldiron, Dolores Correa Stephens, Denise M. M. Robb, James E. Sturm, Isaac R. Elnecave, Michael A. Feinstein, Allen Rubenstein, and Arnold Arbiso, regularly vote in judicial elections and seek opportunities to support candidates who come near to reflecting their views on contemporary issues.

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Lacking wealth or access to wealth, each of the individual plaintiffs cannot contribute large sums to a judicial candidate's campaign. When the candidate who has wealth is the one almost always elected, each of the plaintiffs are harmed as voters. *Id.* at 17-29.

Charles L. Lindner was a candidate for Superior Court judge in 1996 and was allegedly harmed as a result of the voting scheme. *Id.* at 29-30.

Procedural History

On May 15, 1996, Plaintiffs filed a Complaint for violation of Civil Rights-Voting Rights. On June 14, 1996, Applicant, Esther M. Lofton, filed a Motion for Leave to Intervene, which this Court denied. On June 19, 1996, Plaintiffs filed an Amended Complaint for Violation of Civil Rights-Voting Rights. "! Plaintiffs seek the following relief:

> 1. A declaratory judgment that the exclusionary wealth primary in judicial elections:
>
> a. Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
>
> b. Violates the First Amendment of the United States Constitution;
>
> c. Violates the Equal Protection Clause of the California Constitution; and
>
> d. Violates the freedom of speech and freedom of associations protected by the California Constitution.
>
> 2. A declaratory judgment that the defendants' charging a discriminatory fee to print the

voter's pamphlet violates the First Amendment and the Equal Protection Clause of the United States Constitution.

3. An order enjoining the defendants from continuing the wealth primary for election of judicial candidates in Los Angeles County without providing an alternative public source of financing.

4. An order enjoining the defendants from charging a fee for inclusion of all judicial candidates' statements in the County's Official Sample Ballot and Voter Information pamphlet.

On July 2, 1996, the County Defendants filed a Motion to Dismiss the First Amended Complaint based on Federal Rule of Civil Procedure 12(b)(6). On July 8, 1996, Jones filed a pending Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Discussion

A. Standard

In considering a motion a [sic] dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume that the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981)(citing *California Dump Truck Owners Assn. v. Associated General Contractors of America*, 562 F.2d 607, 614 (9th Cir. 1977). Still, the court may not dismiss complaints pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46

(1957); *Russel v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the pleadings. 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure (2d ed. 1990). Therefore, it is only the extraordinary case in which dismissal is proper. *Corsican Productions v. Pitchess*, 338 F.2d 441, 442 (9th Cir. 1964). Moreover, even if the face of the pleadings indicates that recovery is unlikely, the plaintiff is still entitled to offer evidence in support of the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Redwood City*, 640 F.2d at 967. Also, it is important to note that orders granting motions to dismiss are generally implemented without prejudice unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." *Schreiber Dist. v. Serv-Well Furniture*, 806 F.2d 1393, 1491 (9th Cir. 1986).

B. Analysis

The County Defendants first contend that the Association Plaintiffs lack standing to bring these claims. Standing may be challenged by way of a Rule 12(b)(6) motion. *Western Min. Council v. Watt*, 643 F.2d 618 (9th Cir. 1981). The constitutional minimum of standing contains three elements: an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural; a causal connection between the injury and the conduct complained of; and it must be likely that the injury will be redressed by a favorable decision. *United States v. Hays*, 515 U.S. ___, 115 S.Ct. 2431, 2435 (1995).

The County Defendants specifically contend that the Association Plaintiffs lack standing because they cannot provide the first element – an injury in fact. They state that the alleged harm is hypothetical in nature in that there is nothing to distinguish these plaintiffs from other L.A. voters. The Association Plaintiffs, on the other hand, contend that they have standing as associations to assert their members' rights.

In *Hunt v. Washington Apple Advertising Commission*, 432 U.S. (1977), the court stated that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted not [sic] the relief requested requires the participation of individual members in the lawsuit. The County Defendants, then, dispute the first factor – whether the members would otherwise have standing to sue in their own right. As stated above, they claim that there is no injury in fact.

In the First Amended Complaint, Plaintiffs contend that they:

> do not have sufficient income to contribute large sums to help mount a judge campaign nor do they have access to wealth; they cannot contribute sufficient money to a candidate whom they support to enable him or her to conduct a viable campaign; they are effectively excluded from the critical wealth primary process for election of judge candidates in Los Angeles County.

They conclude that because the wealth primary allegedly creates barriers to candidate access to the ballot, it limits

the field of candidates from which the voters can choose. They further allege that they are deprived of their right to participate fully in the voting process because their receiving information about all judicial candidates is dependent on the judicial candidates' ability to pay more than the $45,000 estimated cost of obtaining a voter pamphlet statement for a superior court judicial election office.

This Court finds that the above facts do not properly allege an injury in fact. The above attempts to allege an invasion of a legally protected interests [sic] – voters, right to vote and to participate fully in the election process as guaranteed by the Equal Protection Clause and First Amendment rights to freedom of expression and freedom of association. The allegations contained in the First Amended Complaint are not particularized nor offensive to obtaining a voluntary statement of qualifications in a voter pamphlet. Plaintiffs state that injury was actually suffered in the March 1996 election and is imminent because it will be suffered in every election to follow. This Court does not agree and specifically relies on the case of *Kaplan v. County of Los Angeles,* 894 F.2d 1076 (9th Cir. 1990) which is on direct point and controlling. "The liberal reading accorded complaints on 12(b)(6) motions is . . . subject to the requirement that the facts demonstrating standing must be clearly alleged in the complaint." *Western Min. Council,* 643 F.2d at 624 (citing *Jenkins v. McKeithen,* 395 U.S. at 411, 422 (1969)). This Court concludes that Plaintiffs lack standing to challenge the complained of cost recovery system.

The County Defendants next contend that the legislative cost recovery system does not offend the First or

Fourteenth Amendments to the United States Constitution. Plaintiffs argue that the County Defendants' laws and practices violate their First Amendment rights. Again, relying on the *Kaplan* case, supra, this Court finds as a matter of law and on the face of the pleadings that the cost recovery system associated with publication of election statements in pamphlets put out by local government agencies in connection with elections for non partisan city and county judicial elections and offices do not violate Plaintiffs' First or Fourteenth Amendment rights.

Defendants further contend that with regard to the cost recovery system, the absence of "wealth," without more, is not a suspect classification. This Court agrees.

Based on the foregoing, this Court **Grants** Defendants Conny B. Mccormack, Los Angeles Board of Supervisors, Michael D. Antonovich, Yvonne Deane Dana, Gloria Molina and Zev Yaroslavsky's Motion to Dismiss the First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b) (6) with prejudice and without leave to amend.

Plaintiffs are, in essence, seeking judicial intervention to what they perceive as inequities in the present cost recovery system utilized in non partisan city and county judicial elections. This Court is of the opinion that this

issue is more properly a matter for legislative reform rather than judicial mischief.

IT IS SO ORDERED.

DATED: AUG 12 1996

/s/ DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NAACP, Los Angeles Branch, et al., Plaintiffs, vs. BILL JONES, Secretary of State of California, Conny B. McCormack, Registrar of Voters for Los Angeles County, et al., Defendants.	CASE NO. CV 96-3469 DT (RNBx) ORDER **GRANTING** SECRETARY OF STATE BILL JONES' MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b) (6) WITH PREJUDICE (Filed Aug. 13, 1996)

Background

This action is brought by a group of plaintiffs (collectively "Plaintiffs") against defendants Bill Jones, Secretary of State of California; Conny B. McCormack, Registrar of Voters for Los Angeles County; Los Angeles County Board of Supervisors; Members of Los Angeles County Board of Supervisors Michael D. Antonovich, Yvonne Brathwaite Burke, Deane Dana, Gloria Molina, and Zev Yaroslavsky (collectively "Defendants") for violation of Civil Rights-Voting Rights. Plaintiffs challenge the campaign finance system in judicial elections in Los Angeles County, California because they claim it allegedly discriminates against them on the basis of their lack of wealth and access to wealth. *See* Plaintiffs' Amended Complaint at p. 2. Applicant Esther M. Lofton ("Applicant") seeks to intervene as a party-plaintiff.

It is alleged that the electorial [sic] process which is the subject matter of this action allegedly excludes and discourages voters and candidates who lack vast personal wealth or access to wealth from full enjoyment of their constitutional right to vote. *Id.*

Plaintiff National Association for the Advancement of Colored People ("NAACP") includes more then 4,500 members, almost all of whom are registered voters. A large part of the NAACP members are low or modest income voters and without resources to make large campaign contributions. Thus, the NAACP advocates against election practices where wealth is a requirement for meaningful participation. *Id.* at 8-9.

Plaintiff Multiculture Collaborative ("MCC") is an advocate and catalyst for achieving equitable treatment, intergroup cooperation and democracy in the diverse communities of Los Angeles. *Id.* at 10-11. The MCC, its member organizations, and its program participants who are without wealth are alleged to be effectively excluded from the critical wealth primary process in judicial elections in Los Angeles County. *Id.* at 12.

Plaintiff Southern Christian Leadership Conference of Greater Los Angeles ("SCLC") advocates for justice for all persons regardless of economic status and teaches and encourages full political participation to bring about a just community. Members of the SCLC regularly exercise their right to vote for judges but allege they are harmed because they lack wealth and access to wealth. *Id.* at 13-14.

Plaintiff California Public Interest Research Group ("CALPIRG") has since 1984 played a leadership role in

registering students nationwide to vote. It is alleged that CALPIRG's members ability to choose among a broad group of candidates is hindered by the necessity for candidates to raise large sums to deliver their message. Consequently, CALPIRG's ability to carry out its goals of greater and more meaningful voter participation are harmed. *Id.* at 14-15.

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Each of the remaining plaintiffs, David E. Allen, Frank L. Berry, Hester M. Watkins, Talt Coldiron, Dolores Correa Stephens, Denise M. M. Robb, James E. Sturm, Isaac R. Elnecave, Michael A. Feinstein, Allen Rubenstein, and Arnold Arbiso, regularly vote in judicial elections and seek opportunities to support candidates who come near to reflecting their views on contemporary issues. Lacking wealth or access to wealth, each of the individual plaintiffs cannot contribute large sums to a judicial candidate's campaign. When the candidate who has wealth is the one almost always elected, each of the plaintiffs are harmed as voters. *Id.* at 17-29.

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Procedural History

On May 15, 1996, Plaintiffs filed a Complaint for violation of Civil Rights-Voting Rights. On June 14, 1996, Applicant, Esther M. Lofton, filed a Motion for Leave to Intervene, which this Court denied. On June 19, 1996, Plaintiffs filed an Amended Complaint for Violation of Civil Rights-Voting Rights. Plaintiffs seek the following relief:

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a. Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

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On July 2, 1996, the County Defendants filed a Motion to Dismiss the First Amended Complaint based on Federal Rule of Civil Procedure 12(b)(6). On July 8, 1996, Jones filed a pending Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Discussion

A. Standard

In considering a motion a [sic] dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume that the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981)(citing *California Dump Truck Owners Assn. v. Associated General Contractors of America*, 562 F.2d 607, 614 (9th Cir. 1977). Still, the court may not dismiss complaints pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Russel v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the pleadings. 5A Charles A.

Wright & Arthur R. Miller, Federal Practice and Procedure (2d ed. 1990). Therefore, it is only the extraordinary case in which dismissal is proper. *Corsican Productions v. Pitchess*, 338 F.2d 441, 442 (9th Cir. 1964). Moreover, even if the face of the pleadings indicates that recovery is unlikely, the plaintiff is still entitled to offer evidence in support of the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Redwood City*, 640 F.2d at 967. Also, it is important to note that orders granting motions to dismiss are generally implemented without prejudice unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." *Schreiber Dist. v. Serv-Well Furniture*, 806 F.2d 1393, 1491 (9th Cir. 1986).

B. Analysis

Jones contends that the First Amended Complaint does not allege that he, as Secretary of State, actually charges a fee for candidates' statements or allege that he has done any particular act to create or maintain an "exclusionary wealth primary" except to "oversee" the counties' compliance with governing statutes. He claims that this does not state a claim against him. This Court agrees.

With regard to Jones, Plaintiffs only allege:

> As the chief elections officer of the state, he administers the provisions of the Elections Code. In that capacity, he oversees compliance with the statutes and constitutional requirements governing elections, including the requirement of county-wide elections for the office of superior court judge.

They do not allege any other facts regarding Jones which state a claim for relief. They do not allege, for example, how Jones' administration of the Election Code violates their rights.

Plaintiffs do allege that the "Defendant Los Angeles County Board of Supervisors makes the decision under Elections Code §§ 13309(e) and (f) whether candidates for judge must pay to appear in the voter's pamphlet required for each election under Elections Code § 13307(b)." They further claim that the "Board of Supervisors determines each election cycle whether the candidates must pay some or all of the costs for the publication and distribution of the pamphlet;" and that the "Los Angeles County Board of Supervisors has voted to charge candidates for participation in the voter's pamphlet every election cycle since 1965." These are the actions which Plaintiffs are challenging. Plaintiffs' facts, then, seem to allege a claim against the County Defendants.

Plaintiffs cite to *Bullock v. Carter*, 405 U.S. 134 (1972) and *Morse v. Republican Party of Virginia*, ___ U.S. ___, 116 S.Ct. 1187 (1996) in support of their contention that the Secretary of State has a role in the disputed campaign finance system. In the *Bullock* case, plaintiffs, who were seeing [sic] to become candidates for local office in the Texas Democratic primary election, challenged the validity of a Texas statutory scheme which, without write-in or other alternative provisions, required payment of fees. In *Morse*, at issue was the payment of a registration fee for all Virginia voters willing to declare their support for the Party's nominees at the general election to become delegates to a convention to nominate the Party's candidate for Senator. The plaintiffs in that case stated that

imposition of the requested fee violated sections 5 and 10 of the Voting Rights Act of 1965.

Plaintiffs claim that these cases "hold that what may appear to be a private action becomes state action when it has a role in determining which voters and candidates can participate in the full panoply of the election process." This Court finds that this is a generalization of the holdings of these cases. Furthermore, this Court fails to see the application of these cases to the issue at hand. These cases do not save Plaintiffs' lack of factual allegations against Jones. Even assuming the facts regarding Jones are true, this Court finds that Plaintiffs have failed to state a claim against him. Moreover, it appears from the allegations of the other facts as stated herein that Plaintiffs cannot cure this defect, as the challenged actions and decisions are those of the remaining defendants. Accordingly, this Court **Grants** Defendant Bill Jones' Motion to Dismiss with prejudice.

IT IS SO ORDERED.

DATED: AUG 12 1996

/s/ DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Los Angeles Branch; MULTICULTURAL COLLABORATIVE, SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP; SOUTHERN CALIFORNIA AMERICANS FOR DEMOCRATIC ACTION; DAVID E. ALLEN; FRANK L. BERRY; HESTER M. WATKINS; TALT COLDIRON; DOLORES C. STEPHENS; ISAAC R. ELNECAVE; DENISE M.M. ROBB; MICHAEL A. FEINSTEIN; JAMES E. STURM; ALLEN RUBINSTEIN; ARNOLD ARBISO; CHARLES L. LINDNER,

Plaintiffs-Appellants,

v.

BILL JONES, Secretary of State of California; CONNY B. MCCORMICK, [sic] Registrar of Voters for Los Angeles County; MICHAEL D. ANTONOVICH; YVONNE BRAITHWAITE BURKE; DEANE DANA; GLORIA MOLINA; ZEV YAROSLAVSKY, Members of the Board of Supervisors of Los Angeles County; BOARD OF SUPERVISORS OF LOS ANGELES COUNTY,

Defendants-Appellees.

No. 96-56455

D.C. No. CV-96-03469-DT

ORDER

(Filed Febr. 13, 1998)

Before: HALL and T.G. NELSON, Circuit Judges, and WINMILL, District Judge.*

The panel has voted to deny appellant's petition for rehearing. Judge Nelson has voted to reject the suggestion for rehearing en banc and Judges Hall and Winmill recommend rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

CALIFORNIA ELECTIONS CODE SECTIONS 13300, 13307-13313

13300. (a) By at least 29 days before the primary election, each county elections official shall prepare identical sample ballots for each voter, provided however, that in the case of ballots involving elective political party central or district committee members, each county elections official shall prepare separate ballots for the sole use of persons registered with that party, as provided for in Section 2151. On the official identical primary ballots, each county elections official shall place thereon in each case in the order provided in Chapter 2 (commencing with Section 13100), and under the appropriate title of each office, the names and party affiliations of all candidates organized randomly as provided in Section 13112 and not grouped by political party, for whom nomination papers have been duly filed with him or her or have been certified to him or her by the Secretary of State to be voted for in his or her county at the primary election.

(b) The sample ballots shall be identical to the official ballots, except as otherwise provided by law. The sample ballots shall be printed on paper of a different texture from the paper to be used for the official ballot.

(c) Except as provided in Section 13230, one sample official primary ballot shall be mailed to each voter entitled to vote at the primary not more than 40 nor less than 10 days before the election.

* * *

13307. (a)(1) Each candidate for nonpartisan elective office in any local agency, including any city, county, city

and county, or district, may prepare a candidate's statement on an appropriate form provided by the elections official. The statement may include the name, age and occupation of the candidate and a brief description, of no more than 200 words, of the candidate's education and qualifications expressed by the candidate himself or herself. However, the governing body of the local agency may authorize an increase in the limitations on words for the statement from 200 to 400 words. The statement shall not include the party affiliation of the candidate, nor membership or activity in partisan political organizations.

(2) The statement authorized by this subdivision shall be filed in the office of the elections official when the candidate's nomination papers are returned for filing, if it is for a primary election, or for an election for offices for which there is no primary. The statement shall be filed in the office of the elections official no later than the 88th day before the election, if it is for an election for which nomination papers are not required to be filed. If a runoff election or general election occurs within 88 days of the primary or first election, the statement shall be filed with the elections official by the third day following the governing body's declaration of the results from the primary or first election.

(3) Except as provided in section 13309, the statement may be withdrawn, but not changed, during the period for filing nomination papers and until 5 p.m. of the next working day after the close of the nomination period.

(b) The elections official shall send to each voter, together with the sample ballot, a voter's pamphlet which contains the written statements of each candidate that is prepared pursuant to this section. The statement of each candidate shall be printed in type of uniform size and darkness, and with uniform spacing. The elections official shall provide a Spanish translation to those candidates who wish to have one, and shall select a person to provide that translation from the list of approved Spanish language translators and interpreters of the superior court of the county or from an institution accredited by the Western Association of Schools and Colleges.

(c) The local agency may estimate the total cost of printing, handling, translating, and mailing the candidate's statements filed pursuant to this section, including costs incurred as a result of complying with the federal Voting Rights Act of 1965, as amended. The local agency may require each candidate filing a statement to pay in advance to the local agency his or her estimated pro rata share as a condition of having his or her statement included in the voter's pamphlet. In the event the estimated payment is required, the receipt for the payment shall include a written notice that the estimate is just an approximation of the actual cost that varies from one election to another election and may be significantly more or less than the estimate, depending on the actual number of candidates filing statements. Accordingly, the elections official is not bound by the estimate and may, on a pro rata basis, bill the candidate for additional actual expense or refund any excess paid depending on the final actual cost. In the event of underpayment, the elections official may require the candidate to pay the balance of the cost

incurred. In the event of overpayment, the elections official shall prorate the excess amount among the candidates and refund the excess amount paid within 30 days of the election.

(d) Nothing in this section shall be deemed to make any statement or the authors thereof free or exempt from any civil or criminal action or penalty because of any false, slanderous, or libelous statements offered for printing or contained in the voter's pamphlet.

(e) Before the nominating period opens, the local agency for that election shall determines whether a charge shall be levied against that candidate for the candidate's statement sent to each voter. This decision shall not be revoked or modified after the seventh day prior to the opening of the nominating period. A written statement of the regulations with respect to charges for handling, packaging, and mailing shall be provided to each candidate or his or her representative at the time he or she picks up the nomination papers.

(f) For purposes of this section and Section 13310, the board of supervisors shall be deemed the governing body of judicial elections.

13308. In addition to the restrictions set forth in Section 13307, any candidate's statement submitted pursuant to Section 13307 by a candidate for judicial office shall be limited to a recitation of the candidate's own personal background and qualifications, and shall not in any way make reference to other candidates for judicial office or to another candidate's qualifications, character, or activities. The elections official shall not cause to be printed or circulated any statement which the elections official

determines is not so limited or which includes any reference prohibited by this section.

13309. (a) Notwithstanding Section 13307, if a candidate alleges to be indigent and unable to pay in advance the requisite fee for submitting a candidate statement, the candidate shall submit to the local agency a statement of financial worth to be used in determining whether or not he or she is eligible to submit a candidate statement without payment of the fee in advance.

(b) The statement of financial worth required by this section shall be submitted by the candidate together with his or her candidate statement in accordance with the deadline specified in Section 13307. The statement of financial worth form shall be furnished by the local agency, and may include questions relating to the candidate's employer, income, real estate holdings, tangible personal property, and financial obligations. The candidate shall certify the content of the statement as to its truth and correctness under penalty of perjury. The candidate shall also sign a release form of the candidate's most recent federal income tax report.

(c) Upon receipt of a statement of financial worth, a determination shall be made by the local agency of whether or not the candidate is indigent. The local agency shall notify the candidate of its findings.

(d) If it is determined that the candidate is not indigent, the candidate shall, within three days of the notification, excluding Saturday, Sundays, and state holidays, withdraw the statement or pay the requisite fee. If the candidate fails to respond within the time prescribed,

the local agency shall not be obligated to print and mail the statement.

(e) If the local agency determines that the candidate is indigent, the local agency shall print and mail the statement.

(f) Nothing in this section shall prohibit the elections official from billing the candidate his or her actual pro rata share of the cost after the election.

13310. Prior to the nomination period for an election, the governing body of the local agency conducting the election may determine that Section 13307 is inapplicable to that election. This section shall become operative only if the United States Supreme Court or the California Supreme Court rules that candidates (other than indigent candidates) may not be required to pay for candidates' statements authorized pursuant to Section 13307.

13311. Notwithstanding the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code), the statements filed pursuant to Section 13307 shall remain confidential until the expiration of the filing deadline.

13312. Each voter's pamphlet prepared pursuant to Section 13307 shall contain a statement in the heading of the first page in heavy-faced gothic type, not smaller than 10-point, that: (a), the pamphlet does not contain a complete list of candidates and that a complete list of candidates appears on the sample ballot (if any candidate is not listed in the pamphlet), and that (b), each candidate's

statement in the pamphlet is volunteered by the candidate, and (if printed at the candidate's expense) is printed at his or her expense.

13313. (a) Not less than 10 calendar days before the elections official submits the official voter's pamphlet referred to in Section 13307 for printing, the elections official shall make a copy of the voter's pamphlet available for public examination in the elections official's office. Any person may obtain a copy of the voter's pamphlet from the elections official for use outside of the elections official's office. The elections official may charge a fee to any person obtaining a copy of the material, and the fee shall not exceed the actual cost incurred by the elections official in providing the copy.

(b)(1) During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the elections official, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the material in the voter's pamphlet to be amended or deleted. A peremptory writ of mandate or an injunction shall issue only upon clear and convincing proof of both of the following: (A) that the material in question is false, misleading, or inconsistent with the requirements of this chapter; and (B) that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law.

(2) With regard to a writ of mandate or injunction sought pursuant to this subdivision, the elections official shall be named as respondent and the candidate who authored the material in question shall be named as the

real party in interest. In the case of the elections official bringing the mandamus or injunctive action pursuant to this subdivision, the board of supervisors of the county shall be named as the respondent and the candidate who authored the material in question shall be named as the real party in interest.